IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 24TH OCTOBER 2007 / 2ND KARTHIKA 1929

WP(C).No. 31651 of 2007(R)

OS.366/2006 OF MUNSIFF COURT,MUVATTUPUZHA
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PETITIONER:

JOSEPH, S/O. MANI,
POTHANICATTU HOUSE, RAMALLOOR KARA,
KOTHAMANGALAM VILLAGE.

BY ADV. SRI.P.V.ELIAS

RESPONDENTS:
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1. DAVASSIA, S/O. MAANI,
POTHANICATTU HOUSE, RAMALLOOR KARA,
KOTHAMANGALAM VILLAGE, NOW RESIDING AT
THANA DISTRICT, NAVAGAR ROAD, SRI SUNRISE
APPARTMENT, PIN- 686691.

2. ELSY, W/O. DEVASSIA,
POTHANICATTU HOUSE, RAMALLOOR KARA,
KOTHAMANGALAM VILLAGE, NOW RESIDING AT
THANA DISTRICT, NAVAGAR ROAD, SRI SUNRISE
APPARTMENT, PIN- 686691.

BY

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 24/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.KRISHNAN, J

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W.P.(C) No.31651 OF 2007

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Dated this the 24th day of October 2007

JUDGMENT

This writ petition is preferred against the order in I.A.No.2932/2007 in O.S.No.366/2006 and I.A.No.2933/2007 in O.S.No.366/2006 of the learned Munsiff, Muvattupuzha, who had allowed the application for setting aside the ex parte decree on payment of cost of Rs.5,000/- to the respondents and 1,000/- as batta to the Advocate Commissioner. At the outset, it was not proper on the part of the court to have passed an order issuing a Commission for examination of the defendant even before setting aside the ex parte decree. When an ex parte decree is set aside, plaintiffs may have to be recalled and cross examined and thereafter only the question of defence evidence will arise. The court has to apply its mind under Order 18 of the Code of Civil Procedure to find out whether evidence has to be recorded by itself or it is sufficient by issuance of a Commission. But, without adverting to any of these facts, the court has, in an application to set aside the ex parte decree fixed the remuneration of the Commission, appointed a Commissioner and directed the defendant to pay a sum of

Rs.1,000/-. This is not sustainable. So far as the setting aside of ex parte decree is concerned, it is true that there was a delay of 176 days in filing the application and the plaintiffs have to come from Mumbai most probably to give evidence. One cannot attribute negligence or grave mis conduct on the petitioner and he had moved the court almost in time and he has eagerness in prosecuting the matter. In such case, the court is bound to exercise its judicial discretion of course by directing to pay the cost for the inconvenience caused to the other side. I feel the cost of Rs.5,000/- is on the higher side.

I, therefore, modify the order passed by the court below and allow the application on condition that the petitioner makes a payment of Rs.2,500/- as cost to the plaintiffs within two weeks from today and the question of issuance of commission can be decided by the court below at a later stage and the amount ordered to be deposited for that purpose stands cancelled.

Writ petition is disposed of as above.

M.N.KRISHNAN, JUDGE

Cdp/-